Supreme Court, U.S.
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No. 00-637

In The

Supreme Court of the United States

JOSEPH AND ELIZABETH BARTON-DOBENIN,

Petitioners,

v.

KANSAS DEPARTMENT OF REVENUE,

Respondent.

On Petition For Writ Of Certiorari To The Kansas Supreme Court

REPLY TO BRIEF IN OPPOSITION

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I. The Cases Cited By Respondent Wherein This Court Denied Review Are Factually And Legally Different From The Instant Case.

The Respondent's portrayal of the questions presented in this case as having been decided by other state courts and subsequently denied review by this Court is inaccurate. Brief In Opposition, pp. 2-3. In each of the decisions cited by Respondent, the issues concerned taxation of passive intangible income that was not earned through the conduct of any interstate or foreign activities. *Luther v. Commissioner of Revenue*, 588 N.W.2d 502, 511 (1999) and *Tamagni v. Tax Appeals Tribunal*, 695 N.E.2d 1125, 1132 (1998).[1] In the instant case, the income being taxed is active business income that was earned through the conduct of foreign and international activities.

The complaint in those cases cited by Respondent was that certain intangible income was being taxed more than once by various states, not that facial discrimination against commerce was present.[2] Although duplicative

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[1] *See also, Luther*, 588 N.W.2d at 505 (where taxpayer challenged Minnesota's taxation of her "interest income" as a statutory resident of Minnesota and a resident of the state of Florida); and *Tamagni*, 695 N.E.2d at 1127 (where taxpayer's income was characterized as "investment income from intangible personal property" and the taxpayer was a resident of New Jersey and a statutory resident of the state of New York); and *Zunamon v. Zehnder*, 719 N.E.2d 130, 136-139 (1999) (where the court found that the disallowance of a credit for income taxes paid in foreign states could not be used to offset "replacement tax" liabilities due and imposed upon the privilege of earning or receiving income as a trust and did not result in double taxation prohibited under the Commerce Clause).

[2] *Tamagni*, 695 N.E.2d at 1129; *Luther*, 588 N.W.2d at 509-510; *Zunamon*, 719 N.E.2d at 138.

taxation is present in the instant case, *that is not the basis for Petitioner's constitutional challenge*. It is the *discriminatory manner* of duplicative taxation that is challenged here.

II. The Income Tax Treaty Between The United States And The Czech Republic Is Irrelevant In This Instance.

In its Brief In Opposition, Respondent correctly notes that the U.S. and Czech Republic entered into an income tax treaty relating only to taxation of each country's residents at the national level. Respondent, however, erroneously construes this as an invitation from the federal government for the states to discriminate against foreign commerce. Brief In Opposition, pp. 1, 9-10.

This Court has made plain the fact that income tax treaties between the U.S. and foreign countries relating to national taxation do not speak to state-level taxation, one way or another. *Container Corporation v. Franchise Tax Board*, 463 U.S. 159 (1983), a case relied on by the Respondent, itself indicates this:

> "Third, none of the tax treaties into which the United States has entered covers the taxing activities of sub-national governmental units such as states, and the Senate has at least on one occasion, in considering a proposed treaty, attached a reservation declining to give its consent to a provision in the treaty that would have extended the restriction against apportionment taxation to the states. Finally, it remains true, as we said in Mobil, that "Congress has long debated, but has not enacted, Legislation designed to regulate state taxation of income." 445 U.S., at 448, 100 S.Ct., at 1237.
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> *Container Corp.*, 463 U.S. at 196-197.

Therefore, in the absence of federal legislation respecting the state-level taxation of Czech-source foreign commerce conducted by a state resident, the strictures of the dormant Foreign Commerce Clause apply in full. Unlike in *Itel Containers International Corporation v. Huddleston*, 507 U.S. 60 (1993) and *Wardair Canada, Inc. v. Florida*, 477 U.S. 1 (1986), also relied on by Respondent, there is no issue in the instant case of whether the Kansas tax is in conflict with any specific federal action under the "one voice" prong of the *Japan Lines, Ltd.* test.[3]

III. The Lower Court's Decision Does Not Defeat This Court's Review Of The Question Of Whether The Kansas Tax Credit Provision Discriminates Against Foreign Commerce.

The issue of whether the Kansas tax discriminated against foreign commerce was squarely presented before the lower court. Petition, Appendix A, 10a. In finding that the Kansas statute did not implicate the Foreign Commerce Clause, the Kansas Supreme Court effectively ruled that it did not discriminate against foreign commerce. This is more than an adequate basis for this Court's review under 28 U.S.C. §1257. The lower court

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[3] *See, Itel*, 507 U.S. at 75-76. Note also that the issue in *Itel* was not whether discriminatory state taxation frustrated foreign policy, but rather whether the possibility of *duplicative* taxation on foreign commerce raised foreign policy issues. *Id.* at 74. Certainly, the question of whether discriminatory state taxation engenders economic isolationism on the whole and whether duplicative taxation frustrates the federal government's ability to speak with one voice are two analytically distinct issues under this Court's Foreign Commerce Clause Jurisprudence, each of which could be fatal to a state taxing scheme.

was given ample opportunity to rule on the discrimination question exactly as it has been presented to this Court. *See, Adams v. Robertson*, 520 U.S. 83, 86 (1997) and *Webb v. Webb*, 451 U.S. 493, 495-496 (1981).

IV. The State-level Decisions Cited By The Respondent Demonstrate The Need For Review By This Court In The Instant Case.

Respondent is unable to cite a single decision of this Court to support its contention that the Commerce Clause does not apply to the taxation of resident individuals. Nevertheless, Respondent, the lower court, and the several state courts cited by Respondent rely heavily on this Court's silence, along with one-sentence extracts from *Goldberg v. Sweet*, 488 U.S. 252, 266 (1989) and *General Motors v. Tracy*, 519 U.S. 278, 300 (1997) as authority for this proposition.

Regarding the perceived authority of silence, in *Tamagni*, the New York court stated, "[w]hile this line of cases involved due process challenges, the very fact that the dormant Commerce Clause was never mentioned as a limitation on State power to tax resident income suggests *that there is no such limitation*." *Tamagni*, 695 N.E.2d at 1134 (emphasis added).

Both the lower court herein and the Illinois court in *Zunamon* cite *Goldberg* for the notion that the Commerce Clause is not intended "to protect residents from their own state taxes." Petition, Appendix A, 14a; *Zunamon*, 719 N.E.2d at 137. Further, the lower court and the court in *Tamagni* cite *General Motors v. Tracy* for the proposition that "[t]he dormant Commerce Clause protects markets and participants in markets, not taxpayers as such." Petition, Appendix A, 14a; *Tamagni*, 695 N.E.2d at 1131.

This case presents the opportunity for this Court to clarify whether and to what extent the dormant Commerce Clause applies to taxation of resident individuals actually engaged in foreign commerce. One of the essential issues is whether the above-quoted dictum from *Goldberg* is intended to be such a broad stroke that it removes *any* commercial activities of a resident individual from the dormant Commerce Clause's ambit. Similarly, another essential question is whether the *General Motors* dictum is intended to categorically preclude a resident individual from being a "participant in markets" under the Commerce Clause. Answering these questions in the affirmative is the tack that has been taken by the authorities cited by the Respondent. Petitioners respectfully suggest that given the facts of this case, the lower court has gone too far with this line of reasoning. What *is* certain is that these state-level interpretations have now become authority in their own right and will not likely change until such time as this Court speaks definitively.

Respectfully submitted,

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